

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

KAREN BRITTINGHAM,)	
)	
)	
Employee/Grievant,)	DOCKET No. 16-07-653
v.)	
)	DECISION AND ORDER
)	
DELAWARE DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on October 6, 2016 at the Commission on Veterans Affairs, Robbins Building, 802 Silver Lake Boulevard, Dover, DE 19904.

BEFORE W. Michael Tupman, Chair, Paul R. Houck, Victoria Cairns, Sheldon Sandler, Esq., and Jacqueline Jenkins, Ed.D., Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

Rae M. Mims
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Tasha Marie Stevens, Esquire
on behalf of employee/grievant
Karen Brittingham

Kevin Slattery
Deputy Attorney General
on behalf of the Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The Department of Transportation (“DelDOT”) offered and the Board admitted into evidence eight documents marked for identification as Exhibits A-H. DelDOT did not call any witnesses.

The employee/grievant, Karen Brittingham (“Brittingham”), offered and the Board admitted into evidence two documents marked for identification as Exhibits 1 - 2. Brittingham called two witnesses, Drew Boyce, DelDOT Director of Planning, and Stephanie Johnson, DelDOT Manager of Planning (the successful candidate for the position).

Prior to the hearing, DelDOT made a *motion in limine* to exclude any post-selection statements or evidence regarding the selection of Johnson for the Manager of Planning position because the hiring panel did not have this information. The Board denied DelDOT’s motion finding the witness may testify about her qualifications, in particular whether she had six months of professional planning program administration.

Upon the close of Brittingham’s case, DelDOT moved for an involuntary dismissal of the grievance, asserting Brittingham had failed to meet her burden to provide sufficient evidence to establish a violation of Merit Rule 18.5. The Board deliberated and granted DelDOT’s motion for involuntary dismissal.

FINDINGS OF FACT

On November 25, 2015, the Office of Management and Budget (“OMB”) posted a vacancy announcement for DelDOT for the Manager of Planning. Applicants were required to have education, training and/or experience demonstrating competence in each of the following areas:

1. Six months’ experience in professional planning program administration such as overseeing and directing the development, implementation and evaluation of professional planning programs and

- services; planning and establishing short and long range program goals and objectives. Providing advice to other agency organizational units.
2. Experience in applying the principles and practices of planning related to Data Management and Analysis.
 3. Six months' experience in public policy administration which includes overseeing and directing the development, implementation and evaluation of public policies.
 4. Knowledge of operations management which includes planning, directing, coordinating, controlling and evaluating operations typically through subordinate supervisors.

Both Brittingham and Johnson applied for the position. At the time of application, Brittingham worked in the Planning Office as a Planner IV and Johnson worked in DelDOT's Finance Section as a Senior Fiscal Management Analyst. OMB reviewed the applications and sent a referral list to DelDOT with the names of 18 candidates who met the minimal qualifications for the position, including Brittingham and Johnson. Drew Boyce, the Director of Planning, served as the chair of the hiring panel which included Jeff Niezgoda, Planning Supervisor, and Li Wen Lin, Technology and Innovation Director. Boyce wrote the job description and the interview questions with input from the other members. Boyce would be the successful candidate's supervisor.

The hiring panel reviewed all the applications and pared down the list to 16 and ranked them according to review of applicant's answers to questions and their education/experience. Boyce sent the final questions to the EEO Officer for approval and once received the panel divided up the questions so each member could interview all the applicants. Prior to the interviews, the panel generally discussed the summary statement, the challenges faced by the section and what Boyce wanted to see in the section. The Summary Statement written by Boyce explains:

This position is responsible for obtaining, verifying, and presenting the data necessary to guide the Department's critical decisions. The data collection is federally mandated and requires compliance on data presentation and reporting. Data sets include transportation asset inventory, system usage characteristics,

customer feedback, and the statewide GIS centerline. In addition, the position is responsible for the administration of the Department's annual research program, strategic transportation planning, municipal street aid, project pipeline and the commercial vehicle enforcement program.

The hearing panel scheduled interviews for the 16 candidates over three days. Once completed, Boyce asked the panel to review their notes and packets, think about the interviews over the weekend and to give him a ranked list of their top five candidates, from which he then compiled a list. Each member designated Johnson as their top candidate. Boyce knew Johnson from her involvement in her current position with the six-year Capital Transportation Plan where she coordinated with multiple divisions, worked with MPOs¹, applied the apportionment of funding, reviewed trends in funding and how they were applied to projects, reviewed how fast the money was being spent and inclusion of the plan in the budget for the State.

In addition, Boyce knew Johnson from her former work experience in the Planning Office, where she was supervised by the Assistant Director and worked with the research team to get funding. According to Boyce, all the duties within Johnson's current job included elements of planning in the process. Boyce explained there is no specific education requirement for planning, it is neither an art nor a science but a mixture of both. Planners currently employed at DelDOT have a wide range of academic backgrounds, including employees with college degrees in planning, AICP² certification, or a high school degree with extensive work experience.

Boyce testified the term "planning" is broad and can be interpreted differently depending on the area of the Division in which one may be working. He stated professional planning

¹ A metropolitan planning organization (MPO) is a federally-mandated and federally-funded transportation policymaking organization made up of representatives from local government and governmental transportation authorities.

² The American Institute of Certified Planners (AICP) designation is the American Planning Association's professional institute which provides nationwide, independent verification of planner's qualifications.

program administration encompasses any program that is administered and uses practices and principles, such as: looking at data and trends, assessing issues, developing recommendations and vetting them and implementing the recommendations. The Planning Office within DelDOT serves as a catch-all for a broad range of projects including: regional planning, the street aid program, reviewing and approving access to state highways, doing research projects, coordinating with MPOs, working with transportation alternatives such as bike routes, overseeing project pipelines, conducting surveys, conducting asset investments and working with the Delaware Division of the State Police in truck weight enforcement.

CONCLUSIONS OF LAW

Merit Rule 18.5 provides:

Grievances about promotions are permitted only where it is asserted that (1) the person who has been promoted does not meet the job requirements; (2) there has been a violation of Merit Rule 2.1 or any of the procedural requirements in the Merit Rules; or (3) there has been a gross abuse of discretion in the promotion.

Brittingham asserts Johnson's promotion to the Manager of Planning position violated Merit Rule 18.5 because Johnson does not meet the posted job requirements for the position. According to Brittingham, Johnson did not meet the first of the four essential job requirements for the position:

Six months' experience in professional planning program administration such as overseeing and directing the development, implementation and evaluation of professional planning programs and services; planning and establishing short and long range program goals and objectives; providing advice to other agency organizational units.³

³ Brittingham did not dispute that Johnson met the other three essential job requirements listed in the job posting. Nor did Brittingham claim that DelDOT grossly abused its discretion in selecting Johnson

According to Brittingham, Johnson’s background and experience in finance and budgeting was not the kind of planning experience contemplated by that job requirement, but Brittingham did not provide the Board with any helpful or workable definition of what she believed constitutes “planning.”

The term “planning” could cover a wide range of endeavors including a wedding or event planner, experience which obviously would not qualify a person to be the DelDOT Manager of Planning. The American Planning Association (“APA”), a national trade association which certifies professional planners, describes a planner’s role “to provide the big picture and to relate the project to various goals and guidelines, such as ordinances or design review, in order to relate a final project that meets the needs of the community.” ⁴ The APA lists a number of specializations, including: community development; land use and code enforcement; transportation planning; environmental/natural resources planning; economic development; urban design; planning management/finance; housing, parks and recreation; and historic preservation. ⁵ “While some planners spend their entire career within one of these specializations, most will move between them or find employment opportunities that combine specializations.” ⁶

In Johnson’s job application for the promotion, she checked “yes” that she had the necessary professional planning program administration experience and wrote in support:

As the Senior Fiscal Analyst responsible for DelDOT’s Capital Program from 2007 through 2013, it was my responsibility to ensure DelDOT’s six year Capital Transportation Plan was developed, published for public comment, approved by the Governor, the public, the

for the position of Manager of Planning rather than Brittingham.

⁴ <https://www.planning.org>

⁵ <https://www.planning.org> Like the courts in Delaware, the Board may take judicial notice of facts within the public record, including facts relating to occupations, government websites, and other reliable websites. See *Delaware Trial Lawyers Handbook* §11.7.

⁶ <https://www.planning.org>

two Metropolitan Planning Organizations (MPOs), federal agencies and others, and then implemented.

Drew Boyce, the DelDOT Director of Planning, testified that he believed Johnson's experience developing the Capital Program qualified her for the Manager of Planning position because it was a program which administered and used practices and principles, such as looking at data and trends, assessing issues, developing recommendations, vetting them, and implementing the recommendations.

The Board concludes as a matter of law that Johnson met the job requirements of Manager of Planning, specifically experience in professional planning program administration, based on her development of DelDOT's Capital Program from 2007 to 2013.

According to Brittingham, Johnson was only one player in the development of the Capital Program and others, including Drew Boyce, had significant input. It is to be expected that, with such an important and far-reaching statewide project, other people would be involved while the Capital Program was reviewed up the DelDOT chain-of-command all the way to the Governor's Office. But that does not detract from Johnson's principal role in developing the initial program, modifying it on an ongoing basis with input received from other government agencies and the public, and steering it through the legislative process.

The Board concludes as a matter of law that Johnson's experience developing DelDOT's Capital Program qualified her for the position of Manager of Planning.

ORDER

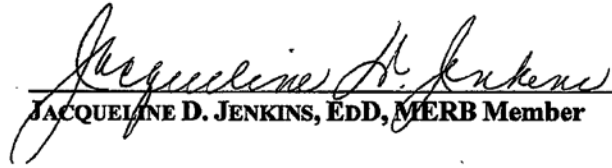
It is this **22nd** day of **November**, 2016, by a unanimous vote of 5-0, the Decision and Order of the Board to deny Brittingham's grievance.



W. MICHAEL TUPMAN, MERB CHAIR



PAUL R. HOUCK, MERB Member



JACQUELINE D. JENKINS, EDD, MERB Member



VICTORIA D. CAIRNS, MERB Member



SHELDON N. SANDLER, ESQ., MEMBER

APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **November 22**, 2016

Distribution:

Original: File

Copies: Grievant
Agency's Representative
Board Counsel
MERB website